

GUIDANCE FOR INCORPORATION OF PLAIN LANGUAGE READING DISCUSSED IN 2018 WEHRUM RECLASSIFICATION MEMORANDUM IN APPLICABILITY DETERMINATIONS

DEVELOPMENT OF APPLICABILITY DETERMINATION RESPONSE

Regional Offices (RO) have the lead in developing responses to Applicability Determination (AD) requests received from sources. To assist the RO in determining when it is appropriate to reference or incorporate information from the 2018 Wehrum Memorandum into either the analysis supporting the AD or the AD itself, OAQPS is providing some guidance on this topic. Use of this guidance will ensure consistency and legal accuracy across EPA in preparing applicability determination responses.

Preparing to respond to the AD request:

If the analysis undertaken to determine applicability of a MACT shows that a source is not subject to the rule based upon the facts of the case (example of information reviewed could include construction dates, equipment removal dates, potential to emit (PTE) limits, permits, etc.) and the determination is the same with or without the publication of the 2018 Wehrum Memorandum, then the AD does not need to cite or include information from the Memorandum. Another way to state this is if the plain language reading of CAA 112 in the Memorandum and the withdrawal of the 1995 "Once In Always In" policy has no impact on the RO determining applicability of the rule, then do not include discussion of the Wehrum Memorandum.

If the analysis undertaken to determine applicability of a MACT shows that a source is not subject to the rule based upon the facts of the case (example of information reviewed could include construction dates, equipment removal dates, potential to emit (PTE) limits, permits, etc.) and the determination relies on the plain language reading of the CAA 112 (a)(1) and (a)(2) definitions of major and area source discussed in the 2018 Wehrum Memorandum to support the reclassification of a major source to area source status, then reference to that plain language discussion should be included.

How to present the discussion of the plain language in CAA 112 contained in the 2018 Wehrum Memorandum:

OAQPS has prepared some draft language for use in this regard (see below). Please note that this draft language may need minor changes to fit with the text of the AD being prepared. To ensure that any small changes you make to this specific language are appropriate

we would appreciate you including Elineth Torres and Debra Dalcher ([HYPERLINK "mailto:torres.elineth@epa.gov"], [HYPERLINK "mailto:dalcher.debra@epa.gov"]) as part of the draft AD review process. Scott Jordan, OGC, is the staff attorney for any issues related to reclassification and is also available for consultation at jordan.scott@epa.gov.

Draft language for incorporation into AD responses relying on the plain language reading discussed in the 2018 Wehrum Memorandum for making a MACT applicability determination (see below).

“On January 25, 2018, EPA issued guidance that supersedes that which was contained in the 1995 Seitz memorandum and withdrew the OIAI policy.¹ As explained in the 2018 Wehrum memorandum, the plain language definitions of major source and of area source in CAA section 112 (a)(1) and (a)(2), respectively, compel the conclusion that a major source that takes an enforceable limit on its potential to emit (PTE) and brings its emissions of hazardous air pollutants (HAP) below the applicable thresholds becomes an area source, irrespective of when the source limits its PTE.”

¹ EPA Memorandum from William L. Wehrum, “*Reclassification of Major Sources as Areas Sources Under Section 112 of the Clean Air Act*,” to Regional Air Division Directors (January 25, 2018).